Supreme Court, U.S.
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No. 79-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

KENNETH LEO FOWLER AND FLORA D. FOWLER,
Petitioners

v.

GENERAL DEVELOPMENT CORPORATION,
Respondent

On Petition For Writ of Certiorari To
The United States Court of Appeals For the Fourth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT

For further clarification, Petitioners submit the following:

Petitioners purchased two undeveloped lots for investment in Port Charlotte, Florida, knowing nothing about Greater Port Charlotte or North Port Charlotte, the latter community adjoining Port Charlotte but in a different county, using the same lot and block numbers as were used in Port Charlotte. ("The community of over 35,000" is in the already developed area.) The carbon copies of the original contracts stated clearly "Port Charlotte". The copy mailed to Petitioners in Maryland from Florida had an "N" akwardly placed in front of "Port Charlotte" on the contract, thereby transferring Petitioner's interests to the other community without their knowledge or consent. The Fowlers had a written promise that public sewer and water lines would be available to the purchased lots. In August, 1970 the Petitioners exchanged, not the original lots in Port Charlotte but, the lots in North Port Charlotte to which they were transferred after signing the contract. When they travelled to Port Charlotte in 1973 and discovered that there was no sewer line existing or even contemplated in the future, they negotiated with General Development Corporation for a house to be constructed in yet another General Development Corporation community nearby

where there was a public sewer line available (in the Gardens of Gulf Cove). Through interrogatories it was revealed that no sewer line was planned to the original lots either. Firm house prices had been quoted to the Fowlers by the Maryland representatives immediately before the trip to Port Charlotte (which trip was arranged by the Maryland representatives). The same model houses were priced substantially higher by the Florida representatives in Port Charlotte. Financing terms were also higher. Contracts for two houses were drawn up and later mailed to Petitioners after they returned to Maryland. The same model house, for which Petitioners were expecting a contract, was advertised in the Washington Post newspaper, at the originally quoted Maryland price, before Petitioners received their contracts from Florida. The Respondent refused to adjust the contract price. Therefore, the agreement was not completed.

The special verdict of the jury stated "yes" to the question whether the Petitioners should have discovered the fraud by July 25, 1972, three years before the suit was commenced and one year before the

last transactions.

REPLY TO QUESTION PRESENTED BY RESPONDENT

The Supreme Court should review the decisions of the District Court and the Court of Appeals below as to specific facts, evidentiary rulings and application of state statutes of limitations because those decisions are not consistent with this court's holdings in claims brought under the Securities Exchange Act of 1934, with the Federal Rules of Evidence and with Maryland Law, and because constitutional claims have been raised herein and their resolution is dependent upon certain specific facts and evidentiary rulings; and the Supreme Court should review the application of state statutes of limitations because a federal statute, the Securities Exchange Act of 1934, has adopted the limitations statutes of the forum state for such actions.

Respondent has presented a question different from those questions presented by Petitioners and a reply is necessary.

ARGUMENT

A major issue below was the status of the undeveloped transferable lots purchased by the Fowlers pursuant to the General Development Corporation's investment program, said lot interests later to be made the basis for purchase of rental property constructed by General Development Corporation and managed by General Development Corporation;possession and use of the lots retained by General Development Corporation for eight years while development was taking place. Were these investment contracts within the definition of securities under the Securities Exchange Act of 1934?

The securities count was not considered by the jury but was dismissed on a motion for Summary Judgment (Pet. App. p. 24). The jury was not allowed to hear of the Respondent's failure to register as a foreign corporation doing business in Maryland. They were not informed of the Maryland law denying the defense of the statute of limitations to an unregistered foreign corporation. Had the jurors known that the Respondent had failed to comply with Maryland law in regard to registration, that fact alone could have caused a

different verdict. (Pet. App. p. 30,31). Those issues were summarily decided and dismissed by the trial judge. (App. on Appeal, Vol II, pgs. 360-366,934-937,976,977,987-988). There is no jury decision, regarding those two questions, for which this court is asked to substitute its judgment.

Like a voice crying in the wilderness, Petitioners implore this Court of last resort, where it may, to undo the wrongs perpetrated upon them by Respondent and compounded by erroneous rulings below.

I

Petitioners are praying this court to determine whether the lot transactions described in this action are securities and/or investment contracts. This is a question of national importance because of the many land development companies selling lots in interstate commerce all over the United States, using the U.S. mail, the telephone and airlines to accomplish their business, and because of the thousands, maybe millions, of purchasers all over the United States and overseas, who invest in such undeveloped land. This is not "a primarily local matter"; no more so than Howey or Ernst,

or Forman were local matters. See U.S. v. Goldberg, 527 F. 2d. 165 (2d. Cir. 1975); U.S. v Amrep, 560 F. ed. 539, cert. den. 98 S. Ct. 731, 434 U.S. 1015, 54 L. Ed. 2d. 759. Ths issue of the state's denial of the defense of limitations to unregistered foreign corporations who do interstate or foreign business in Maryland is also of more than local concern because the statute of limitations, involved in actions under Rule 10b-5 & §78j, are the statutes of the forum states. The state of Maryland is not alone in following a "saving clause", where absentees are parties to suits, and in denying limitations defenses to unregistered foreign corporations.

> In the event that a foreign corporation does business in a state in disregard of constitutional and statutory provisions prescribing the terms upon which such corporations may transact business therein, the effect of such noncompliance upon the rights and liabilities of the corporation and those dealing with it in the state becomes a matter of importance. 36 Am. Jur. 2d. §280 through §285, and footnotes thereto.

Resolution of this question effects every foreign corporation, from every other state and overseas, which deals with Maryland residents and with other states which have similar provisions regarding limitations.

Respondent contends that it is inappropriate "to seek this Court's review of essentially evidentiary questions and concurrent findings of fact by two courts below." Petitioners requested a jury trial on all the issues. There should be no "concurrent findings of fact by two courts below". All the relevant facts should have gone to the jury. Had all the facts so gone to the jury, the verdict would most probably have been a different one.

In Berenyi v. District Director, 385 U.S. 630, 635,636, the court stated that the "two court" rule expounded applies in the absence of a very obvious and exceptional showing of error. In the case now before the court, Petitioners insist that there was such showing of error in summarily dismissing the securities claim, where there was a dispute as to whether particular facts indicated the existence of an investment contract, and there was error in ruling that the claim was time-barred, in spite of the Maryland denial of the defense of limitations for failure to register. Petitioners are not asking this court to assess the credibility or demeanor of

witnesses but they are now asking the Court to determine the proper law applicable to the undisputed facts in regard to the securities and limitations issues.

In Berenyi, supra, cited by Respondent, (p. 661) this very court further stated:

> To be sure, this Court has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution.

There was no constitutional claim raised in Berenyi, but there are such constitutional claims raised here: (Petitioners' Question III(3)-whether the trial court's rulings on evidentiary matters violated the Petitioners' constitutional rights of due process and equal protection under the Fifth and Fourteenth Amendments of the United States Constitution? (Pet.p.8, 48,49)

Petitioners are also seeking a review of the law of evidence as applied by the trial court and affirmed by the Court of Appeals.

The question as to whether General Development Corporation was doing business in Maryland, sufficient for the purpose of registration, was a factual question.

Whether General Development Corporation should be denied the defense of limitations, was a factual question for the jury where a jury had been requested.

With all the multitude of cases raising the question of whether lot transactions similar to the Fowler's are securities, with contradictory answers from court to court, there has been no settling opinion from this Court. United Housing Foundation v Forman, should not be the "last word" because Forman has not resolved the question as it concerns the interstate sale of undeveloped lots; nor has Ernst.

Howey, does well when relating to business enterprises but it does not go far enough to help us now, where the investment is not in orange groves but in residential lots, convertible to other lots and other communities, and transferrable into residential structures for rental or residential purposes. Is an investment contract only in the eyes of the beholder, or is it an investment contract for all purposes? When the Fowlers, who are parents of fourteen children, negotiated for a two or three bedroom house, it was for investment as rental property, not to live in. Someone else might purchase

lots in 1969, intending to build a house to live in (in 1977 or 1980) when the contract normally matured, according to its terms, and the Respondent had developed that particular area. Is that not an investment too in view of the fact that the purchaser has no right to possess or use the lot for many years?

Only this Court can finally resolve the matter.

SEC Securities Act Release No. 5347 (1972-73 Transfer Binder) Fed. SEC L Rep. (CCH) §79,163 (Jan. 4, 1973), referred to by Respondent, opened the door for a decision by this Court when it concluded that real estate units other than condominiums could also involve the offer of a security.

The Respondent's footnote regarding Berman & Stone's Federal Securities Law and the Sale of Condominiums, Homes and Homesites does not explain to the Court that the reason Congress declined to give the SEC regulatory control over enforcement of the Interstate Land Sales Full Disclosure Act was because of strong lobbying pressure brought by the National Association of Real Estate Boards and the National Association of Home Builders, despite statements at the hearing, approving of SEC control, by the Secretary

of the Department of Housing and Urban Development and by representatives of the Department of Health, Education and Welfare ,the Federal Trade Commission, and the Bureau of Land Management. (Berman & Stone, supra, p. 427 & footnote 68 thereto)

II

There is a difference between "registration" pursuant to Maryland Corporations and Associations Article. §7-202(to do interstate and foreign business) and "qualification" pursuant to §7-203 (to do intrastate business). Respondent disregards that difference.

Respondent contends that Petitioners have confused "doing business" for in personam jurisdiction with "doing business" for registration or qualification of a foreign corporation. However, the Court of Appeals of Maryland in November 1979 in S.A.S. Personnel Consultants, Inc. v. Pat-Pan, Inc. ,467 A. 2d. 1139, discusses this matter in a footnote on p. 1141, stating that though recent cases "suggest" that the terms are not coterminous or synonymous with the words "transacting any business in §6-103 of the Courts and Judicial Proceedings Article, and not considered therein because the question was not raised, the court's analysis rests on those cases which

have construed the phrase "doing business" in the same way for both purposes.

The issue as to whether a state law denying the limitations defense to an unregistered foreign corporation should be applied to a securities claim is a question of significance and national importance under the federal securities law. Maryland's Corporation and Association Article significantly includes both registration requirements and Blue Sky Law.

This Court very recently held that a New Jersey statute which tolled limitations periods on causes of action against foreign corporations that do not have in-state representatives for service of process, but not against other foreign corporations, is a rational classification not violative of the Equal Protection Clause. 49 LW 2021 (7-8-80) The dissent in that case stated that the tolling statute should be so construed only where the foreign corporation is not amenable to personal jurisdiction. Maryland's Long Arm Statute was used to reach Respondent herein because it was not amenable to personal jurisdiction.

III

a. EVIDENTIARY RULINGS

To Petitioners the evidentiary and recusal rulings, far from minor ones, deprived Petitioner's of a

fair trial with an impartial judge, subjected them to prejudicial, irrelevant and confusing "mini-trials", and denied them equal protection in the judicial proceedings as conducted by Judge Frank Kaufman.

The very reasons given by Respondent to justify the exclusion of its litigation: "to safeguard against undue burdening of the record, or cumulative, irrelevant and prejudicial matters being placed before the jury" were reasons for excluding Petitioner's other litigation. The "two bases" for the Court of Appeals "approval of the restriction on cross-examination: (1) to avoid irrelevant matters, Federal Rules Evid. 402, and (2) to avoid the confusion and prejudice of mini-trials of issues unrelated to the merits of the case, even had the matters possessed some attenuated relevance, Fed. R. Evid. 403", should have been applied to the Petitioner's other litigation.

b. RECUSAL

The record below (in Petitioner's affidavit and supplement thereto) points out particular episodes and incidents which demonstrate the adverse feelings toward

Petitioner Flora Fowler as exhibited on numerous occasions by Judge Frank Kaufman, not related to particular adverse rulings but to the entire case. Judge Kaufman's remarks indicated a pre-disposition to intimidate and to thwart Flora Fowler's efforts to obtain justice.

"If, before a case is over a Judge's bias appears to have become overpowering, we think it disqualifies him. It follows that the judgment must be reversed". Nicodemus v. Chrysler, Corp., U.S.C.A. Sixth Cir. 1979, 596 F. 2d. 156.

In U.S. v. Hickman, U.S.C.A. 6th Cir. 1979 the Court held that the trial court's interjections and interruptions and the antidefendant tone of its interruptions deprived defendants of a fair trial. "Justice must satisfy the appearance of justice". Offutt v U.S. 11, 14, 75 S. Ct. 11, 13.

In Chafin v U.S. 4th Cir., 5 Fed. 2d. 592, an affidavit describing indecorous remarks---indicative of a purpose to convict was held sufficient to show personal bias.

In Morris v U.S. C.C.A. 8th, 26 F. 2d. 444, an affidavit that set forth remarks by the judge prior to trial showed personal prejudice, against the defendant. Judge Kaufman's remakrs showed personal

prejudice against Flora Fowler.

Sections 47 and 144 of the Judicial Code have always been mandatory; 1974 amendments extended that view to Section 455.

Failure of a judge to step aside if he is disqualified under one of the three statutes always requires reversal. Fed. Practice and Procedure, Vol. 13, Wright §3553.

The test is broad enough to require recusal both in those circumstances where partiality is in fact present and where only the appearance of partiality is in fact present. 28 U.S.C. §455(a); Smith v Pepsica, 434 F. Supp. 524, S.D. Fla. 1977.

Judge Kaufman did not make a determination as to Petitioners' Affidavit's sufficiency. Instead he conducted a one sided mini-trial which emphasized only the statement concerning the judges contact with one of the defense attorneys, which neither judge nor attorney recollected but did not deny, and he ignored the other specific episodes recited in the affidavit. The Court of Appeals also chose to ignore everything in the affidavit except the same incident above, brushing aside completely the trial judge's remarks that he'd

"been pretty hard on Mrs. Fowler and was going to be harder as I go along", as well as other incidents sworn to by Petitioners.

c. DENIAL OF MOTION FOR NEW TRIAL

The trial judge further abused his discretion in denying the Petitioners Motion for a New Trial where it was apparent that the jury's verdict was based upon factors other than the undisputed facts of the frauds revealed at the trial in the written and testimonial evidence.

One final point Petitioners add for this Court's observation only.

Not until the time of the jury trial, after three years of preliminary proceedings, was an appearance made in the case by Jervis Spencer Finney. Mr. Finney was, and is, a most accomplished attorney who has specialized in the past in the prosecution of "white collar criminals" (Ted Agnew, former Vice President, and several other well known officials and politicians in the State of Maryland).

Psychologically, his surprise appearance, which consisted of simply being there during the trial,

may have caused the jurors, being human after all and aligning Mr. Finney with the "good guys" as he had been publicized in the fairly recent past, to view Petitioners as "the bad guys" in the case. That could explain the verdict which was (despite exclusions of proper evidence and inclusions of that which was strictly prejudicial) contrary to the law and against the great weight of the evidence.

CONCLUSION

For all the foregoing reasons, Petitioners, the Fowlers, pray this High Court to grant their Petition for Writ of Certiorari. If granted the opportunity, they are confident that they will be able to show, by the record, everything which they have stated herein and in their Petition.

Respectfully submitted,
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DATE:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply to Respondent's Brief in Opposition were mailed postage prepaid to John A. Wolf, 1600 Maryland National Bank Building, Baltimore, Maryland, 21202, this 10th day of Sept. 1980. I further certify that all parties required to be served have been served.

Flora D. Fowler
FLORA D. FOWLER,
Petitioner,
Pro Se.

NOTE: Maryland Corporations & Associations Article, §7-202, is on page 20 of the Petition. Section 7-203 is included in the Appendix herein.

APPENDIX

APPENDIX

§ 7-203. QUALIFICATION TO DO INTRASTATE BUSINESS

(a) Qualification required. - Before doing any intrastate business in this State, a foreign corporation shall qualify with the Department.

(b) Manner of qualification. - To qualify, the corporation shall:

(1) Certify to the Department:

(i) The address of the corporation; and

(ii) The name and address of its resident agent in this State;

(2) File with the Department a certificate which:

(i) States that the corporation is in good standing under the laws of the place where it is organized; and

(ii) Is executed by the official of that place who has custody of the pertinent records; and

(3) File with the Department an officially certified statement which specifies the date and record reference of:

(i) Its charter or, if not incorporated, the instrument under which it is organized; and

(ii) Each amendment and supplement to the charter or instrument under which it is organized.

(c) Period for which qualification effective.-Unless terminated by the corporation, the qualification is effective as long as:

(1) The corporation has a resident agent in this State;

(2) The corporation does not forfeit its right to do intrastate business under the laws of this State; and

(3) If the corporation qualifies or changes its name after June 1, 1951, the name of the corporation complies with the requirements of Title 2 of this article relating to corporate names. (An. Code 1957, art. 23 § 90;1975, ch.311,§2)

Maryland Corporation & Associations Article.